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MERION COMMUNITY COALITION

LOWER MERION TOWNSHIP ZONING HEARING BOARD

Appeal of Zoning Officer's Determination : Hearing 12/8/08
of September 16, 2008 by Merion Community :
Coalition and by Saint Joseph's University :

**MERION COMMUNITY COALITION BRIEF AS TO ZONING HEARINGS ON
APPEAL OF ZONING OFFICER'S DETERMINATION**

Merion Community Coalition ("MCC"), by and through its attorneys, Hamburg, Rubin, Mullin, Maxwell & Lupin P.C., hereby submits this brief in support of its appeal of the September 16, 2008 Zoning Officer's determination and in opposition to the appeal of the September 16, 2008 Zoning Officer's determination by Saint Joseph's University (the "University").

I. INTRODUCTION

Presently before the Zoning Hearing Board are two appeals from the Zoning Officer's determination of September 16, 2008, an appeal by MCC and an appeal by the University. In addition to its appeal of the Zoning Officer's determination, the University also requested, in the alternative, a special exception pursuant to Sections 155.11.S.2 and 155 11.X of the Lower Merion Zoning Code ("Zoning Code") which was subsequently withdrawn.

II. BACKGROUND

The University is the owner of property located in Lower Merion Township ("Township")

which is noted in the Zoning Officer's determination letter of September 16, 2008 as 401 City Avenue, 35 & 39 Berwick Road and 480 N. Latches Lane ("Property"). The University purchased the Property from Episcopal Academy in 2008. Prior to the purchase of the Property from Episcopal Academy, the University requested certain relief from this Zoning Hearing Board which was granted by Memorandum Opinion and Order dated March 16, 2006, such Memorandum Opinion and Order being based upon evidence submitted during hearings held before the Zoning Hearing Board on October 27, 2005, December 1, 2005 and January 26, 2006 (collectively the "2005 Zoning Hearings"). The Zoning Hearing Board granted relief as follows:

AND NOW, this 16th day of March 2006, it is hereby ORDERED that:

- (1) a special exception under Code § § 155-11 S(2) and 155-11 X is GRANTED to Saint Joseph's University to use the property known as 356-476 N. Latches Lane, 480 N. Latches Lane, and 35 & 39 Berwick Road (the "Property") as part of the University's accredited educational institution, at such time as Episcopal Academy's use of the Property ceases;
- (2) a special exception under Code § § 155-11 S(2) and 155-11 X is GRANTED to Saint Joseph's to immediately use one athletic field on the Property on Sundays, and to use the music facility on the Property up to two times a week;
- (3) under Code § 155-95 AA(4), the Board waives 50% of the required parking spaces (499 waived out of 999 required) for Saint Joseph's use of the Property;
- (4) a variance from Code § 155-95 AA(1) is GRANTED to allow Saint Joseph's to provide 28 of 181 required on-site parking spaces.
- (5) **relief is based on, and is conditioned on adherence to the plans and testimony presented at the hearing** and on Saint Joseph's (a) re-striping the Dietrich lot to add 28 parking spaces and (b) reserving 78 parking spaces adjacent to McShain Hall, which spaces shall be constructed if the Township Zoning Officer determines they are needed at any time during the ten years first following Saint Joseph's taking possession of the Property.

("2006 Zoning Decision") (emphasis added).

The University filed preliminary land development plans prepared by Momenee and Associates, Inc. dated June 20, 2008 with the Township ("Preliminary Plans"). The Preliminary Plans show the construction of an NCAA regulation baseball field, NCAA regulation softball field and NCAA regulation field hockey field on the Property with appurtenant structures such as artificial turf on all three proposed fields, press boxes, dugouts, bull pens, batting cages, score boards, bleachers, public address systems, a ramp and two set of stairs accessing the proposed baseball field, poles with netting, retaining wall, stormwater management system, fences, bollards, extensive lighting fixtures/poles, and curbs as well as a substantial wall along City Avenue approximately 150 feet long. The existing fields bordering Latches Lane are proposed to be merged to form the proposed NCAA baseball field. In contradiction to the testimony presented at the 2005 Zoning Hearings, the University proposes to remove the maintenance building and carriage house near the proposed NCAA baseball field. The proposed ramp and two set of stairs to access the proposed NCAA baseball field have been added due to the proposed change of grade for the depressed baseball field. A retaining wall has been added along Latches Lane along the edge of the proposed NCAA baseball field due to the field being depressed. In addition, thirty-five foot tall netting is proposed along Latches Lane for the proposed NCAA baseball field. Bleachers accommodating spectators are proposed for the baseball field. 12/8/08 N.T. pp. 71-72. Additional bleachers holding spectators are proposed for the softball and field hockey fields for a total of eight hundred (800) bleachers on the Property. 12/8/08 N.T. p.60. No substantive, competent testimony was provided by the University as to the number of bleachers that Episcopal Academy had at the existing fields which have been removed. 12/8/08 N.T. pp. 65-67.

The proposed construction shown on the Preliminary Plans was not presented to the Zoning Hearing Board during the 2005 Zoning Hearings. The testimony and exhibits presented at the 2005

Zoning Hearings and in the University's memoranda of law to the Zoning Hearing Board indicated that there would be no construction, no new buildings, and no physical changes to the Property. At the 2005 Zoning Hearings, the University presented no testimony or exhibits in reference to the construction of NCAA fields. The University presented no testimony or exhibits in reference to any proposed structures needed for the fields. In fact, Exhibit A-2 from the 2005 Zoning Hearings shows the existing fields were to remain as they existed for Episcopal Academy.

Once it became clear that the University was proposing major construction and major physical changes to the Property, MCC sent letters to the Township Zoning Officer dated August 26, 2008, September 10, 2008 and September 17, 2008 and attended the September 8, 2008 Township Planning Commission meeting to explain its position on the University's proposed construction. At the September 8, 2008 Planning Commission meeting, and as part of the September 10, 2008 letter to the Township Zoning Officer, MCC presented a compilation prepared by The Waetzman Group as to the major changes between the Preliminary Plans and the University's plans submitted as Exhibit A-2 in the 2005 Zoning Hearings, titled "Saint Joseph's University-Episcopal Academy Proposed Use Site Plan" ("Proposed Structures"). A copy of The Waetzman Group's compilation is attached hereto and made a part hereof as Exhibit "A".

On September 16, 2008, the Zoning Officer made the following determination:

The proposed press box, dugouts, bleachers and public address system for the baseball field near Latches Lane, and the proposed press box, dugouts and bleachers for the softball field near Berwick Road, and the proposed bleachers for the hockey field along City Avenue are considered an expansion to a use permitted by special exception under the definition of § 155-4 Expanded Use. Any expansion beyond what was previously testified to before the Zoning Hearing Board requires a new special exception from the Zoning Hearing Board under § 155-11S(2) and/or § 155-11X.

Both MCC and the University appealed the Zoning Officer's determination. MCC's position is that it agrees with the Zoning Officer's determination that the proposed press boxes, dugouts, bleachers and public address systems are an expanded use but asserts that all of the Proposed Structures are an expanded use as defined by the Zoning Code and all of the Proposed Structures are in contradiction of Condition #5 of the 2006 Zoning Decision that the relief granted was based on, and conditioned on, adherence to the plans and testimony presented at the 2005 Zoning Hearings.

On December 8, 2008, the Zoning Hearing Board held a hearing on the appeals by the University and MCC ("December 8, 2008 Zoning Hearing"). At the December 8, 2008 Zoning Hearing, the University presented the testimony of land planner Dennis Glackin ("Land Planner Glackin") who had testified at the 2005 Zoning Hearings and MCC presented the testimony of land planner Charles Guttenplan ("Land Planner Guttenplan"). The Zoning Hearing Board accepted both land planners as experts. The University presented a book of exhibits consisting of twelve (12) exhibits and MCC presented three (3) exhibits.

III. JURISDICTION

Pursuant to Section 909.1(a)(3) of the Pennsylvania Municipalities Planning Code ("MPC"), 53 P.S. §10909.1(a)(3), Zoning Hearing Board has jurisdiction to hear and render final adjudications from appeals of the determination of the Zoning Officer.

IV. ARGUMENT

Throughout the testimony at the 2005 Zoning Hearings, including the testimony and memoranda of law presented by the University to the Zoning Hearing Board, the University represented to the Zoning Hearing Board that there would be no construction, no physical changes to the Property, no new buildings and no new structures. The compilation of Proposed

Structures prepared by The Waetzman Group demonstrates that the University is proposing construction well beyond what was identified in testimony and exhibits at the 2005 Zoning Hearings and, therefore, Condition #5 of the 2006 Zoning Decision is being violated and the Proposed Structures are an Expanded Use as defined by the Zoning Code, § 155-4. See Exhibit "A". The Zoning Officer presented no explanation in his September 16, 2008 determination letter as to why all the Proposed Structures were not a violation of Condition #5 of the 2006 Zoning Decision and why the Proposed Structures beyond the proposed press boxes, dugouts, bleachers and public address systems were not an Expanded Use pursuant to § 155-4 of the Zoning Code.

The University argues in its December 8, 2008 Memorandum of Law to the Zoning Hearing Board ("12/8/08 Brief") that the Proposed Structures, proposed construction, and intensity of the use of the fields as well as all of the Proposed Structures were "apparent" and "clearly explained" throughout the 2005 Zoning Hearings although the University's witnesses testified at the 2005 Zoning Hearings that there would be no construction, no physical changes to the Property, no construction on the Property, no new structures on the Property and no new buildings on the Property, and although the University did not present or testify to any of the University's game schedules, practice schedules, or intramural schedules during the 2005 Zoning Hearings. (12/8/08 Brief, pp. 3, 4).

A. 2005 ZONING HEARINGS

The testimony at the 2005 Zoning Hearings by Land Planner Glackin clearly indicated that there would be no physical changes to the Property. In answer to whether the proposed use is consistent with the public health, safety and welfare, Land Planner Glackin testified as follows:

. . . There are no proposed changes to the **drainage**, the air quality because **there are no physical changes being proposed here.** . . .

10/27/05 N.T. p. 63 (emphasis added).

Land Planner Glackin also testified in reference to impervious coverage:

A. As we said earlier, there is **no proposed construction here**, so the impervious coverage limits which are in the same section of 155-11 would not apply to this application.

10/27/05 N.T. p. 55 (emphasis added).

Dr. Brice Wachterhauser, provost of the University ("Provost Wachterhauser"), also testified that no new construction was planned for the Property.

Q. Dr. Wachterhauser, is any new construction planned for this site?

A. No.

10/27/05 N.T. p.39.

In the beginning of the presentation of the University's 2005 case to the Zoning Hearing Board, Attorney Michael Sklaroff presented sworn testimony to the Zoning Hearing Board, as follows:

Mr. Sklaroff: Importantly, **the proposed use by the university is substantially the same as the current use**, education, including classrooms, lecture halls, athletic fields and administration buildings.

10/27/05 N.T. p. 7 (emphasis added).

Mr. Sklaroff: This is a very complicated – let me say this. **The proposal is very straight forward. There is no construction. The existing use is going to be - - is the same as the proposed use.** Having said that, your code provides that where users include I believe five or more people who are of driving age, then the application is required to be a special exception. Now, that's all well and good because a special exception requires –recognizes that it's a legal use, but requires us to prove there is no adverse effect on the public health, welfare and safety.

10/27/05 N.T. p. 9 (emphasis added).

Mr. Sklaroff: But what I saw here is that the limitation really is that we must get or an applicant unless the Board decides otherwise, must have a building permit within six months. **Now, here there is no construction proposed. There will be no building.**

10/27/05 N.T. p. 10 (emphasis added).

In both of the University's briefs to the Zoning Hearing Board during the 2005 Zoning Hearings, the University states the use by the University of the Property will be substantially the same as the use made by Episcopal Academy. In the Memorandum of Law with Respect to Parking, the University states the following:

"The University proposes no new construction." p.2.

"The Application concerns no new construction and the University does not seek to extend its proposed educational use to any existing building, or portion thereof, that is not currently being used for educational purposes." pp. 3-4. (Emphasis added).

The University also references the testimony of Land Planner Glackin on pages 4 and 5 of the Memorandum of Law with Respect to Parking to support its argument for the requested relief for parking:

"The University is not proposing any new construction. N.T. 10/27/05 at 58." p.4.

"The University is not proposing any additional places of assembly. N.T. 10/27/2005 at 60." p.5

In its Memorandum of Law Regarding Duration of Approvals, the University states the following:

“Here, the University does not propose the construction of any new buildings, but merely the use of existing facilities . . .” p. 4.

The University’s proposed use of the Property is **substantially similar to Episcopal’s current use**. See Testimony of Leonard Haley, Director of Plant & Operation for Episcopal (N.T. 10/27/05 at 45); Testimony of Dennis Glackin, AICP (N.T. 10/27/2005 at 49-50).” p.7. (Emphasis added).

In its 12/8/08 Brief, the University highlights its own shortcomings as to the testimony and evidence presented at the 2005 Zoning Hearings as compared to what it is proposing today. In its 12/8/08 Brief to the Zoning Hearing Board, the University cites to Provost Wachterhauser’s testimony as follows:

The playing fields . . . How we plan to use these fields, basically the sports that prefer grass, would move over and be dependent on these fields. **Varsity baseball, softball, men’s and women’s soccer primarily. They would be on all – on all of these fields.** Some intramural use as well, **as it fit into the athletic practice and game schedule.**

12/8/08 Brief, pp. 3-4 citing 10/27/2005 N.T. pp. 38-39 (emphasis in 12/8/08 Brief). The University never provided any further testimony or evidence at the 2005 Zoning Hearings as to the University’s game schedules or practices for baseball, softball or soccer nor presented any testimony or evidence as to what constituted “some intramural use” but, instead, reassured the Zoning Hearing Board and the neighbors present at the 2005 Zoning Hearings that “all the fields will be used the same way.” 10/27/05 N.T. p.45; See 10/27/05 N.T. pp. 7, 9, 67. Provost Wachterhauser never even mentions field hockey in his testimony, nor does he mention the term “NCAA” in his testimony other than one time referring to the tennis courts. 10/27/05 N.T. p.39. Interestingly, Provost Wachterhauser did not testify that any changes or modifications needed to be made to the existing tennis courts to meet NCAA standards. University President, Fr. Lannon

made no mention of the use of the fields for NCAA purposes in his testimony. 10/27/05 N.T. pp. 28-29. Land Planner Glackin made no mention of the use of the fields for NCAA purposes nor did he testify as to any NCAA requirements or standards that the University would need to meet for the fields. Although the University now argues that “varsity” equates with NCAA, this was never testified to or referenced by the University during the 2005 Zoning Hearings. 12/8/08 N.T. p.108. The University never presented any testimony that any improvements to the existing fields were needed to bring the fields into compliance with NCAA standards, nor has the University presented evidence as to what the NCAA standards or requirements are for the proposed fields.

In its 12/8/08 Brief, the University cites to the testimony of neighbor Walter Herman:

Saint Joe’s has been and I’m sure wishes to be a national athletic presence certainly in basketball and maybe in other sports And I can also imagine, therefore, there is going to be a lot of use of that particular lot [adjacent to Latches Lane] theoretically for parking **when it comes time for weekend games and games on the campus.** So I would like to know more about and **I’d like to have some restriction placed on the evening, weekend and athletic events use of that particular parking lot.”**

12/8/08 Brief, p.4 citing 12/01/2005 N.T. p. 55 (emphasis in 12/8/08 Brief).

The University also cites to the testimony of neighbor Carolyn Lowe in its 12/8/08 Brief:

The two issues that we’re [York-Lynne Condominium Association] concerned with. One is the noise and light from the fields. **There are games there currently, and that would continue, and it appears to be an opportunity to increase that with the use by Saint Joe’s.**

12/8/08 Brief, p.4 citing 10/27/2008 N.T. p. 76 (emphasis in 12/8/08 Brief). The University never followed up and presented any testimony or evidence after these neighbors voiced concerns about the evening and weekend games and the University’s intention to increase the use of the fields near

Latches Lane and York-Lynne Condominium Association. Instead, the University relied on its position that the use of the fields would be similar to Episcopal Academy's use of the fields.

As the testimony demonstrates, the University had the opportunity during the 2005 Zoning Hearings to make clear that the use of the fields would be different than the use made by Episcopal Academy and to present evidence of the intended modifications to the athletic fields. Instead, the University declined to do so and now points the finger at the neighbors stating the neighbors, without the benefit of information from the University, should have been aware of what the University was proposing for the use and intensity of use of the proposed fields (12/8/08 Brief, pp.8, 10).

B. DECEMBER 8, 2008 ZONING HEARING

In his testimony on December 8, 2008, Land Planner Glackin, testified that Exhibit A-3, the Phase I Plan prepared by Glackin Thomas Panzak, shows various alterations being made to the Property that were not testified to at the 2005 Zoning Hearings:

. . . For instance, there is a NCAA baseball field being proposed along Latches Lane at the western end of the property. There is a softball field being proposed south of the baseball field with an intramural area directly to the south of the softball field. There is a field hockey field proposed along City Avenue, which is next to an intramural facility that's located on the east side next to the Merion campus. There is a proposed walkway from City Avenue in to the campus. There are changes to some of the sidewalks and pathways within the campus and that would essentially be what has been shown on the land development plan.

I would like to just go back for one second to A-6, which is the proposed use site plan that was presented to the Board in 2005 and again match the athletic facilities that were used by Episcopal Academy to the proposed facilities on A-3. Athletic facilities which was a track and football field along Berwick Road which is now a proposed softball intramural field, two fields along City Avenue which are now proposed for the field hockey field, and the intramural field. And I would also like to note that on

Latches Lane there are actually two fields on the original plan, proposed use plan, and that has now been reduced to one larger field which is the baseball field. . . .

12/8/08 N.T. pp. 39-40, See also 12/8/08 N.T. pp. 42-43. As stated by the University's engineers on Sheet 3 of 38 of the Preliminary Plans, Note #7:

7) THE PURPOSE OF THIS PLAN IS TO SHOW THE DEVELOPMENT OF THE SITE WITH THE REMOVAL OF SEVERAL OF THE BUILDINGS, WALKWAYS AND DRIVE AND THE **CONSTRUCTION OF A NEW BASEBALL FIELD, A NEW SOFTBALL FIELD, AND A NEW FIELD HOCKEY FIELD** ALONG WITH WALKWAYS, PARKING MODIFICATION AND STORMWATER MANAGEMENT IMPROVEMENTS.

See Exhibit O-2 (emphasis added).

At the December 8, 2008 Hearing, Land Planner Glackin testified to the following changes from what was presented by the University through testimony and evidence at the 2005 Zoning Hearings and what the University is presently proposing:

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed baseball field being lowered/submerged four feet necessitating the need for ramps and stairs to access the proposed field. Land Planner Glackin admitted that the existing baseball field is a surface level field. 12/8/08 N.T. pp. 49, 70

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed use of artificial turf on the proposed three fields. Land Planner Glackin admitted that the use of artificial turf is a physical change to the Property. 12/8/08 N.T. p.64.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the removal of any buildings near the baseball field. Land Planner Glackin admitted that the existing

carriage house near the baseball field will not continue to be used for residential purposes as testified to at the 2005 Zoning Hearings, but, instead, is proposed to be removed. 12/8/08 N.T. pp.65, 81.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference the proposed dugouts and bleachers. 12/8/08 N.T. pp. 44, 48. In fact, Land Planner Glackin admitted that Episcopal Academy did not have dugouts and testified that "clearly I did not know there would be a dugout at the time. . . . That was not part of our application then." 12/8/08 N.T. p. 48. Land Planner Glackin admitted that the existing Episcopal Academy bleachers were not shown on Exhibit A-6 (Exhibit A-2 from the 2005 Zoning Hearings) except for the football field but that the numbers of bleachers was not indicated for the football field, just the location. 12/8/08 N.T. pp. 65-67, 71-72; 78-79.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed press boxes. In fact, Land Planner Glackin admitted that Episcopal Academy did not have press boxes on the Property and he "never thought about a press box." 12/8/08 N.T. pp. 48-49, 91.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed permanent public address system. In fact, Land Planner Glackin admitted that Episcopal Academy had a portable public address system which was not shown on any plans at the 2005 Zoning Hearings or testified to at the 2005 Zoning Hearings and the University' proposed public address system is permanent. 12/8/08 N.T. pp. 59, p.67-68.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed retaining wall along Latches Lane. 12/8/08 N.T. pp. 68-69.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed lighting. In fact, Land Planner Glackin admitted that his testimony at the 2005 Zoning Hearings was that Episcopal Academy's existing lighting was sufficient for the University's use. 12/8/08 N.T. p.61; 10/27/05 N.T. p.56. Attorney Sklaroff's also testified at the 2005 Zoning

Hearings that the existing lighting was sufficient. 10/27/05 N.T. p.7.

The University presented no testimony or evidence at the 2005 Zoning Hearings in reference to the proposed 35 foot high fence along Latches Lane. 12/8/08 N.T. p.67.

Specifically as to construction, structures and buildings, and the use of artificial turf and intensity of use of the fields, Land Planner Glackin testified as follows:

i. Construction

Land Planner Glackin admitted in his December 8, 2008 testimony, despite the University's witnesses and Attorney Sklaroff's testimony to the contrary at the 2005 Zoning Hearings, that construction is proposed for the Property. Land Planner Glackin admitted the construction of the proposed NCAA regulation baseball field would involve construction. 12/8/08 N.T. p.70. Land Planner Glackin admitted that due to change in elevation on the proposed baseball field there is a need to construct steps and a ramp to get to the field. 12/8/08 N.T. p.72. In addition, artificial turf requires construction of underlying layers of base material and drainage facilities. 12/8/08 N.T. pp.73, 84. Land Planner Glackin admitted that the artificial turf requires construction and that there is construction associated with the stormwater management underneath the proposed artificial turf. 12/8/08 N.T. pp. 55-56, 84. As admitted by Land Planner Glackin, the proposed dugouts will require construction including digging into the ground and providing footings. Land Planner Glackin admitted that the proposed press boxes will require construction including footings and a foundation. 12/8/08 N.T. pp. 45, 46. Land Planner Glackin admitted that the installation of the proposed 35 foot high fence along Latches Lane involves construction and the proposed retaining wall along Latches Lane requires

construction. 12/8/08 N.T. pp.67, 69. Exhibit 0-3 from the December 8, 2008 Zoning Hearing consist of pages 21, 23 and 24 of the Preliminary Plans titled "Construction Details" and list and demonstrate the extensive construction that is being proposed by the University in direct contradiction of the testimony presented by the University at the 2005 Zoning Hearings that "no construction" and "no physical changes" were being proposed for the Property.

ii. Structure/Building

The Township Zoning Code and Subdivision and Land Development Ordinance ("SALDO") both define "structure" as follows:

Structure: Any form or arrangement of building materials involving the necessity of providing proper support, bracing, tying and anchoring.

Pursuant to both the Zoning Code and SALDO, "the word 'building' includes the word 'structure' . . ." See Section 155-4 of the Zoning Code and Section 135-2 of the SALDO.

Land Planner Glackin admitted in his December 8, 2008 testimony that the proposed bleachers, dugouts and press boxes are structures. 12/8/08 N.T. pp. 46, 54. In fact, Land Planner Glackin admitted that "a structure under your ordinance can be just about anything . . ." 12/8/08, N.T. p. 54. Land Planner Glackin admitted that the proposed 35 foot high fence is the construction of an outdoor recreation structure and the proposed permanent public address systems are outdoor recreation structures. 12/8/08 N.T. p.85. Since the word "building" includes "structure", every structure is a building.

iii. Intensity of Use of Fields and Artificial Turf

During his December 8, 2008 testimony, Land Planner Glackin testified that "he is not sure there is any difference of use between a grass field and artificial turf field." 12/8/08 N.T. p.

54. But after questioning by Chairman Aaron admitted that an artificial turf field can have more use:

Chairman Aaron: But you will agree that if I have an artificial – the reason why you put in artificial turf is so you can use it continuously basically rather than a turf field has certain inherent limitation and amount of days you can use it and conditions you can use it.

The Witness: It can have more use and there's less maintenance associated with it. That's true.

12/8/08 N.T. p.56. The University has not provided any specific information as to the varsity use, practice use, and intramural use of the fields, relying on its arguments that the Zoning Hearing Board and neighbors should implicitly know what the intensity of use is for college athletics. The proposed installation of the artificial turf reinforces the concern, which the MCC has repeatedly raised, that the proposed intensity of the use of the fields by the University will exceed the intensity of the use of the fields by Episcopal Academy.

C. Condition # 5 of the 2006 Zoning Decision is being violated

Condition #5 of the 2006 Zoning Decision states that the relief granted is based on, and is conditioned on, adherence to the plans and testimony presented at the 2005 Zoning Hearings. To modify conditions granted as part of zoning relief, the case law states as follows:

Based on the Amoco [Oil Company v. Zoning Hearing Board of Middletown Township, 76 Pa.Cmwlth.35, 463 A.2d 103 (1983)], Saber, 106 Pa.Commonwealth Ct. 389, 526 A.2d 464 (1987), and Gazebo [Inc., v. Zoning Hearing Board of Adjustment of the City of Pittsburgh, 112 Pa.Cmwlth. 37, 535 A.2d 214 (1987)] decisions, [Robert]Ryan concludes that

An owner which wishes to obtain a modification of a condition which has become final can obtain relief if he establishes:

(1) Either grounds for a traditional variance (Saber) or changed circumstances which render the condition inappropriate (Amoco); and

(2) Absence of injury to the public interest.

This court agrees with Mr. Ryan's analysis of this court's decisions. The approach this court has taken with regard to requests for removal of conditions placed on the grant of special exceptions is also appropriate in cases involving conditions placed on the grant of variances.

Ford v. Zoning Hearing Board of Caernarvon Township, 616 A.2d 1089, 1092 (Pa.Cmwth.1992).

The changed circumstances required to obtain a modification of a condition are a subsequent substantial change in conditions incident to the land itself, not personal desires. The University never appealed Condition #5 of the 2006 Zoning Decision, and, therefore, it is final. In order to obtain a modification of Condition #5, the University is required to present the Zoning Hearing Board with evidence of the traditional grounds for a variance or subsequent, substantial change in conditions incident to the Property itself, not its personal desire to have NCAA regulation fields and the Proposed Structures, and absence of injury to the public interest.

None of the Proposed Structures were presented to the Zoning Hearing Board at the 2005 Zoning Hearings and are, therefore, in violation of Condition #5. Case law requires that that University request relief for all of the Proposed Structures as a modification of Condition #5 of the 2006 Zoning Decision.

In its 12/8/08 Brief, the University confuses the issue of Condition #5 of the 2006 Zoning Decision and the land development process alleging that the "physical changes to the playing fields along with the designation to a particular sport . . . are matters not regulated by the Zoning Code." (12/8/08 Brief, p. 5). Once the University failed to appeal Condition #5, it was bound by Condition #5 during the land development process. In addition, the University argues that the

“Playing Field Improvements”¹ are properly addressed in land development. (12/8/08 Brief, p.11).

It is in the land development process, with the input of the Township Engineer, Township Planner and other staff, where issues such as traffic, sound, landscaping, stormwater run-off, buffering and environmental impacts are properly raised and addressed.

(12/8/08 Brief, p.11). The issues that the University points out in its 12/8/08 Brief as being matters of land development, are actually issues that were to be addressed by the University as part of the 2005 Zoning Hearings. Section 155-114.C. of the Zoning Code states as follows:

C. [Amended 3-18-1981 by Ord. No. 1949] In determining whether the allowance of a **special exception** or a variance is contrary to the public interest, the Board shall consider whether the application, if granted, will:

(1) Adversely affect the public health, safety and welfare due to changes in traffic conditions, drainage, air quality, noise levels, natural features of the land, neighborhood property values and neighborhood aesthetic characteristics.

¹ The Playing Field Improvements is a defined term in the 12/8/08 Brief.

The proposed installation of dugouts and new bleacher seating, which have a press box feature for the softball and baseball fields, along with the replacement and upgrade of the public address system (together with the Playing Fields Reconfiguration, the “Playing Field Improvements”) (12/8/08 Brief, p.5).

The Playing Fields Reconfiguration is defined to include: (i) combining the existing baseball field and general use playing field along Latches Lane into an intercollegiate baseball field; (ii) converting the existing football field into a combination intercollegiate softball field and intramural field; (iii) converting the two general use playing fields along City Avenue into an intercollegiate hockey field and intramural field; (iv) eliminating the existing track; (v) installing artificial turf on the baseball, softball and field hockey fields; (vi) re-grading necessary to implement these reconfigurations; and (vii) demolishing a handful of obsolete buildings (together, the “Playing Fields Reconfiguration”) (12/8/08 Brief, p.5).

(2) Be in accordance with the Lower Merion Township Comprehensive Plan.

(3) Provide the required parking required under Article XX of this chapter.

(4) Adversely affect the logical, efficient and economical extension or provision of public services and facilities such as public water, sewers, refuse collection, police and fire protection and public schools.

(5) Otherwise adversely affect the public health, safety, morals or welfare.

(Emphasis added).

The University tries to circumvent its burden of proof pursuant to Section 155-114.C. of the Zoning Code by claiming that the "Playing Field Improvements" did not have to be brought before the Zoning Hearing Board at the 2005 Zoning Hearings because all these items were "implicit" in the 2006 Zoning Decision and are "necessary" to outfit the fields for intercollegiate varsity and intramural athletics." (12/8/08 Brief, pp. 8, 10). With no testimony or evidence presented by the University, either at the 2005 Zoning Hearings or the December 8, 2008 Zoning Hearing, the University claims that the Zoning Hearing Board and the neighbors should have known that the term "varsity" means "NCAA" and that there are certain NCAA requirements that the University must meet in order to play intercollegiate varsity sports, which requirements are still unknown. 12/8/08 N.T. pp. 108-109. The University has never testified as to any NCAA requirements and which, if any, of the Proposed Structures is required to meet NCAA requirements. The University has never testified as to why the present Episcopal Academy fields do not meet NCAA standards or requirements. Interestingly, on more than one occasion, Land Planner Glackin admitted that he was unaware at the time of the 2005 Zoning Hearings that certain structures, such as the dugouts and press boxes, were "implicit" and "contemplated" by

the University but expects that the Zoning Hearing Board and neighbors should be held to a higher standard and should have contemplated these structures during the 2005 Zoning Hearings.

D. Expanded Use

§ 155-11.X states that “[a]ny use permitted in any residential zoning district by special exception or conditional use **can only be expanded in like manner**. (Emphasis added).

“Expanded Use” is defined by the Zoning Code as follows:

EXPANDED USE — The enlargement of the use of property evidenced by any of the following: the construction of or addition to a building, a parking lot or outdoor recreation structure or equipment; the construction of a new athletic field, a new playground or a new hard-surfaced area designed or intended to be used for sporting or other physical recreation activities; the extension of the use of property beyond the permitted parameters established by the Zoning Hearing Board, or beyond those parameters established in the record of testimony presented to the Zoning Hearing Board in support of an approved application; an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population associated with the use as it was authorized by a previously granted special exception or, if not so authorized, as it had been historically used; an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population of driving age associated with the use as it was authorized or, if unauthorized, as it historically experienced; or a change in the days or hours of normal operation. [Added 6-17-1998 by Ord. No. 3491]

(Emphasis added).

The Zoning Officer provided no explanation of why only the proposed press boxes, dugouts, bleachers and public address system were considered an expansion to a use permitted by special exception under the definition of § 155-4 Expanded Use and none of the other Proposed Structures were.

The extension of the use of property beyond the permitted parameters established by the Zoning Hearing Board, or beyond those parameters established in the record of testimony presented to the Zoning Hearing Board in support of an approved application.

In this case, the clearest application of the definition of Expanded Use is that the University is proposing a use of the Property beyond the permitted parameters established by the 2006 Zoning Decision and by the record of testimony presented to the Zoning Hearing Board at the 2005 Zoning Hearings in support of the University's application. The University is proposing the construction of NCAA regulation fields and the Proposed Structures, none of which were ever heard or seen by the Zoning Hearing Board or the neighbors at the 2005 Zoning Hearings. The mere comparison of Exhibit A-2 from the 2005 Zoning Hearings and the Preliminary Plans shows that an Expanded Use is being proposed. 12/8/08 N.T. p. 103. The University, by its own testimony and exhibits, and its failure to appeal Condition #5, voluntarily limited its use of the fields. Interestingly, the University does not even address this section of the definition of "Expanded Use" in its 12/8/08 Brief.

The construction of or addition to a building, a parking lot or outdoor recreation structure or equipment.

Land Planner Guttenplan opined that items 1 through 13 on attached Exhibit A represent construction of, or addition to, outdoor recreation facilities on the former Episcopal Academy campus with the exception of the removal of various buildings. 12/8/08 N.T. pp. 100, 101-103. As noted in Argument Section B, the University is proposing construction of outdoor recreation structures and equipment including the proposed press boxes, dugouts, bull pens, batting cages, score boards, bleachers, artificial turf, stairs, ramps, thirty-foot tall netting, and public address systems. The University is proposing construction of the following structures which are in turn

defined as buildings: the proposed retaining wall, wall along City Avenue, various fences, bollards, extensive lighting fixtures/poles and curbs.

The construction of a new athletic field, a new playground or a new hard-surfaced area designed or intended to be used for sporting or other physical recreation activities

As testified to by Land Planners Glackin and Guttenplan, the University is combining two fields to create the proposed NCAA regulation baseball field and is excavating the existing fields in order for the proposed baseball field to be four feet lower than the existing fields, which in turn necessitates the construction of a ramp and stairs. See 12/8/08 N.T. pp.72, 102. The University is proposing a change from natural grass to artificial turf for all three proposed NCAA fields. 12/8/08 N.T. p. 102. The softball field is the construction of a new field as it replaces the existing track and football field. See 12/8/08 N.T. p.72. Clearly, the University is proposing the construction of new NCAA athletic fields since the existing fields are not being retained. The University own engineers indicate that the proposed NCAA baseball, softball and field hockey fields are "new fields". See Exhibit O-2. Even if the Zoning Hearing Board were to find that new athletic fields are not being proposed, at the very least, new hard-surfaced areas are proposed due to the construction of artificial turf on all three fields.

An increase of five persons or 10%, whichever is greater, in the student and faculty or participant population associated with the use as it was authorized by a previously granted special exception or, if not so authorized, as it had been historically used; an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population of driving age associated with the use as it was authorized or, if unauthorized, as it historically experienced; or a change in the days or hours of normal operation.

Land Planner Glackin testified that in the vicinity of the baseball field, the University is proposing 400 bleachers whereas in Glackin's estimation Episcopal Academy had 200 bleachers.

12/8/08 N.T. pp. 71-72. As opined by Land Planner Guttenplan, this clearly evidences an expanded use. 12/8/08 N.T. pp. 103, 106. The number of bleachers proposed shows that there will be an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population associated with the use of the Latches Lane baseball field as it was authorized by a previously granted special exception or, if not so authorized, as it had been historically used as well as an increase of five persons or 10%, whichever is greater, in the student and faculty or participant population of driving age associated with the use as it was authorized or, if unauthorized, as it historically experienced.

At the December 8, 2008 Zoning Hearing, Land Planner Glackin testified as to his October 17, 2005 Memorandum regarding the intensity of the proposed use by the University which was marked as Exhibit A-5 at the 2005 Zoning Hearings and marked as Exhibit 0-3 at the December 8, 2008 Zoning Hearing. Land Planner Glackin admitted that there is no discussion regarding the use of the athletic fields during weekends. 12/8/08 N.T. p.81. Nor could he recall any specific testimony as to the use of the athletic fields during weekends. 12/8/08 N.T. p.81. The normal days of operation for the University are listed as Monday through Friday from late August until late May. 12/8/08 N.T. p.81. In addition, the University provided three exhibits at the 2005 Zoning Hearings, Exhibits A-12, A-13 and A-14, as to evening activities at Episcopal Academy. None of those exhibits show a use of the athletic fields in the evenings by varsity or intramural teams. Nor did Lenard Haley, Director of Plant Operation at Episcopal Academy, testify in reference to any weekend or evening use of the fields by Episcopal Academy. 10/27/05 N.T. p.43-47; 71-73. The University' traffic expert, Adrienne Eiss, did not testify as to any existing or proposed weekend or evening use of the fields. 12/1/05 N.T. pp.12-50.

The use of the proposed NCAA regulation fields will change the days or hours of normal operation of the existing fields from how Episcopal Academy used the fields since, although not specifically testified to by the University, the University has alluded to the fact that there are weekend games and more games are played by college varsity teams than are played by a high school varsity teams.


All of the Proposed Structures are an Expanded Use pursuant to several of the subparts of the definition of Expanded Use, not just the proposed press boxes, dugouts, bleachers and public address systems. The University is required to seek relief for all of the Proposed Structures as they all meet the definition of Expanded Use.

V. CONCLUSION

WHEREFORE, the Merion Community Coalition respectfully requests that the Zoning Hearing Board affirm Merion Community Coalition appeal of the Zoning Officer's determination and dismiss the University's appeal of the Zoning Officer's determination.

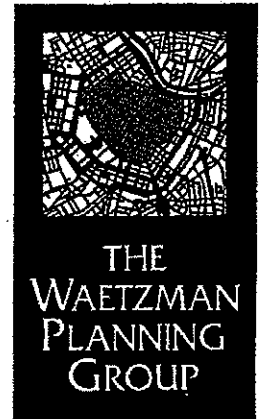
Respectfully Submitted,

HAMBURG, RUBIN, MULLIN,
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By: 
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Date: 1-19-09

MAJOR CHANGES: PRELIMINARY PLANS (UPDATED 8/22/08) OF JAMES J. MAGUIRE '58 CAMPUS SAINT JOSEPH'S UNIVERSITY and EXHIBITS PRESENTED AT 2005-2006 ZONING HEARING BOARD HEARINGS



1. The area with two smaller playing fields bordering Latches Lane that appeared on the plans used at the Zoning Hearing Board is now shown as an NCAA baseball field.
2. Buildings and structures have been added including a press box, dugouts, bull pens, batting cages, score boards and bleachers. The bleachers are designed to hold 1100 people throughout the site, compared to a very small bleacher area on the plans put into evidence at the Zoning Hearing Board.*
3. Three fields are now proposed as artificial turf whereas all fields had been grass at the time of the Zoning Hearing Board application.
4. The maintenance building to the east of the NCAA baseball field which showed on the plans at the ZHB, has been removed.
5. A carriage house, located west of Residence C which was shown on the plans at the ZHB, has been removed.
6. The squash court located between the Science Building and the Dining hall on the plans at the ZHB, has been removed.
7. Two sets of stairs and a ramp accessing the NCAA baseball field have been added due to proposed change of grade.
8. An open space area on the plans at the ZHB west of the playing field on City Avenue, has been replaced with a "Temporary Stone Staging Area". The use for this area is unclear.
9. Thirty-five foot tall netting is proposed along Latches Lane for the majority of the year (February to November).
10. Public address systems have been added.
11. A retaining wall has been added along Latches Lane along the edge of the NCAA baseball field because this field will now be depressed.
12. A substantial wall (almost 150 feet long) has been added along City Avenue near the proposed Cardinal Avenue pedestrian entrance.
13. Various fences, bollards, extensive lighting fixtures/poles, and curbs have been added throughout the site.

* Based upon interpretation of symbols on plan. Bleachers at softball and field hockey not labeled and shown different graphically than at baseball field.

Sept. 8, 2008

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